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In the Supreme Court of the United States

No. 303

EZRA PARKS,

Petitioner,

v.

SIMPSON TIMBER COMPANY, a corporation, and GRACE LINE, INC., a corporation,

Respondents.

BRIEF FOR RESPONDENT SIMPSON TIMBER COMPANY IN OPPOSITION

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Respondent, SIMPSON TIMBER COMPANY, opposing the issuance of a Writ of Certiorari, prays for denial of the petition. Petitioner's citations to Opinions Below, statement of Jurisdiction, Statement of Constitutional Provisions Involved, and Petitioner's Appendices are accurate and adequate.

QUESTIONS PRESENTED

1. When a judgment debtor in a cause on appeal pays the judgment under the threat of immediate execution, is such a payment voluntary, rendering the issues upon appeal moot and requiring dismissal, when the debtor has exhausted all available remedies for a stay of execution, and the cause is subsequently remanded to the lower court for further proceedings consonant with the debtor's petition?

2. Whether the decision of the Ninth Circuit Court of Appeals reversing the jury verdict for error committed at trial concerning the conduct of petitioner's attorney "denies petitioner his right to jury trial under the Seventh Amendment" when the cause (as to damages) is remanded for a new jury trial which will, hopefully, be conducted without error or prejudicial comment?

STATEMENT OF THE CASE

Respondent Simpson Timber Company (hereinafter "Simpson") has cross-petitioned for a Writ of Certiorari against petitioner Ezra Parks, co-respondent Grace Line, Inc., and Brady-Hamilton Stevedore Company, No. 322, October Term, 1968. Simpson's cross-petition against Grace Line, Inc., and Brady-Hamilton Stevedore Company is premised upon the Ninth Circuit's erroneous application of the concept of indemnity in derogation of the rule in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342

U.S. 282 (1952). If any party is entitled to indemnity it is Simpson.

In ruling upon petitioners' earlier petition for certiorari No. 1335, October Term, 1966, this Court essentially held that a jury could find that a manufacturer of a product, even one unfamiliar with the custom of the waterfront, must anticipate a misuse of its product. However, the summary reversal by this Court on June 12, 1967 was withdrawn on October 16, 1967. This Court vacated the judgment of the Ninth Circuit and remanded the cause to that tribunal to pass upon issues not considered in the prior opinion. 389 U.S. 909 (1967). The Ninth Circuit reconsidered, and remanded the cause to the District Court for a new trial on damages alone (Pet. Br. App. A).

Simpson disagrees with the concept that a manufacturer must anticipate misuse of his product, and with the tenet that a new trial upon liability was not commanded by the facts. At the very least, Simpson was properly granted a new trial on damages and allowance of damages in excess of the ad damnum clause was beyond the penumbra of fairness.

This Court merits an expanded statement of the case.

Petitioner brought an action to recover damages for personal injuries sustained while working as a longshoreman in and about the No. 5 hatch of the S.S. SANTA FLAVIA. He was loading cargo aboard the vessel, owned and operated by respondent Grace

Line, Inc. The cargo included bundles of doors packaged and delivered to the dock by Simpson. The bundles were approximately 42 inches in height and the window openings were aligned. The packages were designated "Fine Doors." The packaging was of corrugated cardboard on all sides except the end; it was intended to protect the doors from damage during transit (R. IV, 200, 208-209).

Simpson had sold the doors to Oregon Lumber Export Co., f.o.b. dock (R. IV, 195-196, Ex. 31, 32). *Oregon Lumber Export Co.* (*the shipper*) arranged to transport the doors upon the Grace Line Vessel (R. IV, 200). No complaint had ever been made regarding the packaging (R. IV, 197, 209, 210, 214), and Simpson did not anticipate that longshoremen would walk upon the doors (R. IV, 198, 210, 214).

Longshoremen loaded the doors onto the vessel and placed them in the square of the hatch (R. IV, 43); longshoremen then walked upon the packages of doors while loading sacks of flour. The petitioner fell into a package of doors while carrying such a sack (R. IV, 50).

Simpson did not know that it was the custom of longshoremen to walk upon the cargo during the loading process (R. IV 210-216). Simpson's Portland plant manager assumed that the cargo was maneuvered by forklifts and the packages were designed to be so handled (R. IV, 212-213). Other manufacturers in the area packaged their doors in similar fashion and did not expect the longshoremen to walk upon them (R. IV, 214-216).

Since petitioner has gratuitiously (Pet. Br. 7-8) chosen to summarize Simpson's "main points on appeal" (Pet. Br. 7) it might be pertinent to note that, *inter alia*, Simpson alleged error in the following "unsummarized" areas:

1. The District Court erred in permitting petitioner to introduce into evidence as expert testimony the testimony of a person not in the same industry as Simpson.

2. The District Court erred in failing to submit certain requested instructions and in misinstructing the jury concerning the use of the product intended by the manufacturer.

3. The District Court erred in concluding that Grace Line, Inc., was entitled to indemnity against Simpson.

4. The District Court erred in refusing to grant indemnity to Simpson against Grace Line, Inc., and/or Brady-Hamilton Stevedore Co. on the ground that the latter were active tort-feasors and breached their contractual obligation to load the vessel in a safe and workmanlike manner.

In summarizing the holdings of the Ninth Circuit at various stages of this case, petitioner's advocate asserts those portions of the opinions which suit him well. For example, in commenting upon Judge Ely's dissent in the original hearing (Pet. Br., App. F), petitioner limits his comment to the portion of Judge Ely's opinion concerned with damages (Pet. Br. 8). It

is noteworthy that Judge Ely discussed several aspects of the appeal, including the liability issues and the misconduct of petitioner's attorney (Pet. Br. App. F., 56-76).

Again, concerning the *in banc* hearing and decision of November 9, 1966, petitioner states that the majority "did not consider any issue raised by Simpson on appeal" (Pet. Br. 9), which is a pejorative synopsis of what was obviously a reasoned and considered opinion. Simpson's appeal was taken from each and every portion of the record and judgment (R. II, 146, Notice of Appeal) and the Statement of Points on Appeal and other post-trial documents encompassed error in the instructions in conformity with Simpson's theories of the case. See, e.g., Points 1-4, 7, 9, on Motion for Judgment Notwithstanding the Verdict (R. II, 130-131); Points 4-7, 12, on Motion in the Alternative for a New Trial (R. II, 131-133); Point 6, Statement of Points on Appeal (R. II, 186); Brief for Appellant Simpson Timber Company, pp. 14-16).

On June 12, 1967, the last day of term, this Court not only granted certiorari but also summarily reversed the Ninth Circuit judgment *per curiam*, 388 U.S. 459 (Pet. Br. 10). This unusual proceeding, unanticipated in light of the rules of this Court prohibiting argument in petitions for certiorari and briefs in opposition, placed Simpson in an inextricable position. A timely petition for rehearing was filed on July 5, 1967, and thereafter, on July 12, 1967, Simpson moved for a stay of exectuion of judgment in the

United States District Court for the District of Oregon *where the mandate had been entered.* After the District Court determined that it lacked jurisdiction, Simpson twice made application to this Court for a stay of execution pending determination of the cause on petition for rehearing. Mr. Justice Fortas denied Simpson's initial motion for stay on or about August 3, 1967 (R. VI, 19), and Mr. Justice Black denied the subsequent motion to reconsider and motion to stay on or about August 29, 1967 (R. VI, 19). Neither denial was apparently premised upon defect in Simpson's mode of proceeding. Indeed, this Court's rules do not provide relief for a respondent placed in such a critical position.

At no time did Simpson waive its appeal rights or retract its position. During the summer of 1967, following the summary reversal, attorneys for petitioner and Simpson remained in close contact concerning the mandate and the petition for rehearing. On August 29, 1967, Mr. Frank Pozzi (attorney for petitioner) addressed the following communication to Simpson's counsel:

> "Dear Mr. Roberts:
>
> "We feel we have extended every courtesy to you in the above matter, including our latest delay while application for stay was made. We have just received word from the U. S. Supreme Court Clerk that the latest application has been denied.
>
> "This is to advise you and your clients that

unless full payment is made to date of judgment, costs and interest by 5:00 P.M., Thursday, August 31, 1967, we shall commence proceedings to execute the following morning, Friday, September 1, 1967.

Very truly yours,

FRANK POZZI"

(Exhibit 4, Appellant Simpson Timber Company's Countermotion for Reconsideration of Issues on Appeal.)

On August 31, 1967, spurred on by that demand, petitioner's attorneys were notified by letter as follows:

"This will confirm my telephone conversation with you in regard to Mr. Pozzi's letter of August 29, 1967.

"At this time I am furnishing you a copy of my letter of August 31, 1967, to Donal D. Sullivan, Clerk of the United States District Court for the District of Oregon, indicating I have paid into Court the sum of $96,353.50 in this case.

"The payment is made with the specific reservation of, and without prejudice to, the right of Simpson Timber Company to prosecute its Petition for Rehearing in the Supreme Court of the United States and to secure all benefits of any reversal or modification or subsequent judicial procedure.

"The payment is also made to prevent Mr. Pozzi's threatened execution in this case against my client alone."

(Ex. 3, Appellant Simpson Timber Company's Countermotion for Reconsideration of Issues on Appeal.)

Simpson's attorney also wrote to Mr. Sullivan on the same day:

> "At this time I am handing you the check of the Safeco Insurance Group in the amount of $96,353.50 which represents the principal and the interest thereon, the Supreme Court of the United States' costs in the amount of $100, the Trial Court's costs plus interest in this case.
>
> "This check is to satisfy the judgment against Simpson Timber Company and is from the Surety on the supersedeas bond that was filed in this case. This payment is being made as Mr. Frank Pozzi, the attorney for Mr. Parks, has advised me in writing that unless full payment was made by 5:00 p.m. Thursday, August 31, 1967, he would commence proceedings to execute on Friday, September 1, 1967."

A $96,353.50 check accompanied the letter, and Simpson concurrently filed a "Motion for Deposit" in the United States District Court for the District of Oregon, Civil No. 62-156, which stated (omitting formal matters):

> "'There is deposited herewith with the registry of this court, draft in the amount of NINETY-SIX THOUSAND THREE HUNDRED FIFTY-THREE and 50/100 ($96,353.50) DOLLARS, dated on or before the 31st day of August, 1967, payable to the order of the Clerk of the District Court of the United States for the District of Oregon. The amount deposited is based upon a

verdict and judgment in favor of plaintiff dated the 17th day of April, 1964, which judgment was reinstated by judgment and order of the Supreme Court of the United States, dated the 12th day of June, 1967.

This deposit is made with the specific reservation of, and without prejudice to, the right of Simpson Timber Company to prosecute its petition for rehearing filed in the Supreme Court of the United States and to secure all benefits of any reversal or modification or subsequent judicial proceedings."

(Exhibit 2, Appellant Simpson Timber Company's Countermotion for Reconsideration of Issues on Appeal.)

Petitioner withdrew the funds from registry on September 11, 1967, and entered a satisfaction of judgment after this Court amended its *per curiam* June 12, 1967 opinion, vacated the judgment of the Ninth Circuit Court of Appeals and remanded the cause (R. VI, 14, 24-32) (Pet. Br. 11).

As indicated by petitioner (Pet. Br. 11-13), the Ninth Circuit was presented with all relevant information on petitioner's motion for dismissal of appeal and issuance of mandate. Sitting *in banc*, that tribunal rendered a decision on February 20, 1968 (Pet. Br. App. A). Presumably, the Court considered all the matters before it, including petitioner's motion to dismiss the appeal. In its decision, the Ninth Circuit treated as germane the issues of whether or not a mistrial should have been granted because of the preju-

dicial remarks of petitioner's attorney in his opening statement and whether or not the award of damages was excessive. (In addition, the indemnity issue raised by the cross-petition was discussed.)

The Ninth Circuit reversed the judgment both as to Simpson and Grace Line, Inc., and remanded the cause for a new trial solely on the issue of damages. While Simpson believes that a new trial should have been granted on liability as well as damages, in any event, the question of damages should be retried. The Ninth Circuit found that petitioner's counsel, a competent and experienced member of the plaintiff's bar, who should have known better, indicated on opening statement that the manner in which Simpson packaged its doors had been altered following the accident. The Court quite properly held that under the specific circumstances of the case, the comment probably prejudiced the respondent and inflated the verdict. It is not beyond the judicial ken to recognize that intentionally inflammatory comments or unintentional prejudicial statements may encourage a jury to increase damages as "punishment" for a wrongdoer. Obviously, this was the major premise of the Ninth Circuit's decision.

Petitioner too tersely synopsizes the dissent of the Ninth Circuit (Pet. Br. 14; see also 26-27). A brief review of Appendix A (p. 9) reveals that the two dissenting judges *would have reversed on liability.* Therefore, *all* nine members of the respected Ninth Circuit found that Simpson was harmed by the unwarranted comment by petitioner's counsel.

REASONS FOR DENYING THE WRIT

There is no reason for this Court to grant petitioner's requested Writ of Certiorari. The Ninth Circuit decision, if anything, excessively favored petitioner; any error affected Simpson, both as to indemnity and failure to remand for a new trial on liability. The cause has been remanded for a new trial by jury, pursuant to proper instructions and trial conduct, on the issue of damages. None of the reasons set forth in Rule 19, Rules of the Supreme Court of the United States, exist here. Despite petitioner's oft-repeated complaint about the duration of this litigation (Pet. Br. 4, 14, 22), the fact remains that it is petitioner's conduct which is responsible for the delay. Even if that were not the case, respondents are also entitled to a fair trial, without error or prejudice, and the mere fact that the case has "tacked and veered" through the federal courts is of itself no reason to grant certiorari.

I

Petitioner, by Coercing Payment of the Judgment, did Not Obliterate the Right of Appeal of Simpson.

The District Court judgment was appealed by Simpson on several grounds and an appropriate supersedeas bond was posted. After Simpson's successful appeal, petitioner petitioned for certiorari and, on the last day of term, this Court granted the petition and summarily reversed. After Simpson exhaust-

ed all possible means to secure a stay of execution pending a hearing upon its timely petition for rehearing, petitioner's attorney threatened execution on a day certain. Bowing to this threat, but expressly reserving all rights attendant upon its petition for rehearing and further proceedings, Simpson's surety paid the money into court on the day prior to the threatened execution. The motion for deposit, as well as the letter to the clerk of the District Court of the United States for the District of Oregon and the epistle to petitioner's attorney, specified that the payment was involuntary, that it was made under duress, compulsion and to stave off imminent execution, and that the coerced payment was made expressly reserving any and all rights of Simpson. Subsequently, the United States District Court for the District of Oregon ordered petitioner to repay a portion of the sum into the registry of the Court pending the new trial (Pet. Br. 15-16, fn. 2).

It requires more than a normal amount of gall to contend that Simpson is somehow barred because of "mootness" or "fair judicial administration" from pursuing its appellate remedies because petitioner's attorney coerced payment by threat of immediate execution.

Petitioner contends that an advisory opinion ought not be rendered and that the action should have been dismissed by the Ninth Circuit Court of Appeals as moot (Pet. Br. 16-17). A viable controversy still exists between petitioner and Simpson (and between

Simpson and the co-respondents); to contend otherwise is sophistry. If, upon a new trial, petitioner fails to recover an equal or greater amount of damages from Simpson, then Simpson may receive the excess paid petitioner under coercion. Petitioner would strait-jacket the federal courts by his implication that restitutionary relief for Simpson is unavailable. Simpson is not remediless and collectability is a collateral problem, one which Simpson must assume.

Petitioner's conclusory argument lacks pertinent authority. It ignores the fact of coercion, the fact that the petition for rehearing resulted in a vacation of the judgment and a remand to the Ninth Circuit, and the obvious fact that a gross miscarriage of justice would occur if petitioner prevails.

What could Simpson have done to protect its right of appeal and forestall execution? It could not anticipate that this Court, contrary to common practice, would grant the petition for certiorari *and* summarily reverse (citing an inapposite case) on the last day of term.

None of petitioner's authorities (Pet. Br. 16) are factually apposite; none assist in determination of this case at bar. This cause is not moot. Payment of a judgment under duress after exhaustion of all potential remedies for stay renders payment involuntary and does not vitiate the issues on appeal.

Next, recognizing that mootness constitutes an insubstantial argument, petitioner argues that as a

"matter of fairness and sound judicial administration" the action should be terminated (Pet. Br. 17).

If a payment of a judgment made prior to execution is coerced and involuntary, and not made with a view to settling and terminating the cause, the judgment debtor does not waive or lose any right of appeal, or benefits derived from subsequent appellate remedies. A majority of states accept this rule. See cases collected in 39 A.L.R.2d Annot. "Defeated Party's Payment for Satisfaction of or Other Compliance with, Civil Judgment as Barring His Right to Appeal," 153-191 (1955), particularly cases collected at pages 160-163. Even those opinions seemingly discordant with the majority rule (see Pet. Br. 18, fn. 3) would, in most instances, refuse to strip Simpson of its rights under the compulsion which petitioner's attorneys exerted.

The stated rule is the rule of this Court. See *Cahill* v. *New York, NH & HR Co.*, 351 U.S. 183 (1955) (Pet. Br. 19); *Dakota County* v. *Glidden*, 113 U.S. 222 (1885); compare *Railroad Company* v. *County Commissioners*, 98 U.S. 541 (1878) and *Thorp* v. *Bonnifield*, 177 U.S. 15 (1900). (Pet. Br. 17-18).

This rule controls in the Ninth Circuit. *Puget Sound Navigation Co.* v. *Nelson*, 59 F.2d 697 (9th Cir. 1932); *The Barge No. 25*, 14 F.2d 107 (9th Cir. 1926); *Josevig-Kennecott Copper Co.* v. *James F. Howarth Co.*, 261 F. 567 (9th Cir. 1919); *Hoogendorn* v. *Daniel*, 202 F. 431 (9th Cir. 1913).

Oregon accepts the rule. See *Edwards* v. *Perkins*, 7 Or. 149, 154-155 (1879); *Staiger* v. *Holman*, 144 Or. 67, 69-70, 6 P.2d 43, 18 P.2d 591, 23 P.2d 917 (1933); *Fritz* v. *Fritz*, 179 Or. 612, 617, 174 P.2d 169 (1946); *Lewis et ux* v. *Shook et ux*, 182 Or. 483, 490-492, 188 P.2d 148 (1947); *Brown et al* v. *Harris and Gregory*, 187 Or. 658, 659-661, 213 P.2d 176 (1950); and other decisions cited therein.

Petitioner seeks unsuccessfully to distinguish *Cahill*. *Cahill* was an action under the Federal Employers' Liability Act and, for the purposes of this cause, was quite similar to the case at bench. Petitioner argues that *Cahill* is different because it was governed by "the law of the sea" (Pet. Br. 21). No authority for this purported distinction is propounded. Does petitioner believe that a sniff of salt air by a land-based stevedore alters his status from a person covered by the Federal Employers' Liability Act? Certainly there are no cases according a greater protection to Mr. Parks than Mr. Cahill. The "ward of admiralty" argument is inadequate to distinguish the causes; granted, seamen may acquire a special status, they are no more worthy than employees under the Federal Employers' Liability Act. Of course, realistically, no longshoremen are subjected to any "special hazards of the ship's service" in the sense that concept applies to the traditional mariner. See Foley, "A survey of the Maritime Doctrine of Seaworthiness," 46 *Or. L. Rev.* 369, 407, 420 (1967).

In a further attempt to distinguish *Cahill*, peti-

tioner asserts that this Court ought to alter its decision. It is noteworthy, however, that the four dissenting Justices, upon whom petitioner places such reliance, were concerned primarily with the fact that an out-of-time *second* petition for rehearing (in substance) was filed in *Cahill*, constituting a severe departure from the rules of this Court. Furthermore, the dissent stated that "voluntary payment of a judgment amounts to accord and satisfaction. . . . Payment under duress is, of course, a different matter. We do not know whether this judgment was paid under duress. . . ." (351 U.S. at 190.)

In the instant case, there was no out-of-time second petition for rehearing. The judgment was paid under coercion and duress for the sole purpose of impeding execution. *Cahill* supports Simpson's position and the *Cahill* dissent was concerned with matters absent from the instant case. No vague threat was posed here; petitioner's attorneys promised execution on a date certain. This was no idle threat. To avoid the irreparable disruption of business and hardship attendant to execution upon a $96,000 judgment, Simpson's surety paid the judgment under protest into deposit of the Court. No one could be misled as to Simpson's intentions. To consider and give substance to petitioner's position would be to countenance a gross miscarriage of justice.

II

Petitioner has Not Been Deprived of Any Rights under the Seventh Amendment.

Petitioner was deprived of no right and fair administration of the appellate system requires no application of supervisory intervention by this Court.

Petitioner asserts (Pet. Br. 22, et seq) that the Ninth Circuit Court of Appeals "had obviously been motivated by concern over what it believed to be excessive damages." There is no basis for this bald assertion attacking nine members of a respected court. Although unclear from petitioner's brief, it must be recalled that the decision of the Ninth Circuit remanding for a new trial was unanimous; the two dissenters believed that the new trial should encompass the question of liability, while the seven members of the majority remanded solely for a retrial on damages. All nine members of the Ninth Circuit agreed that the unwarranted and unnecessary statement by Mr. Pozzi, petitioner's experienced bodily-injury attorney, was prejudicial to the rights of Simpson. Petitioner's unwarranted attack upon the motivation of the Ninth Circuit lacks basis in fact and should be censured.

After careful consideration, the Ninth Circuit held that Simpson had been denied a fair trial because of error. *All* parties will have their day in District Court upon a new trial on the question of damages. There is no fundamental unfairness in this procedure. It is

impossible to take seriously petitioner's assertion that he is denied a right to jury trial. Dissenting in *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 455-456 (1959), Mr. Justice Frankfurter stated:

> ". . . If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence. . . ."

Further, petitioner seeks to reargue matter which has already been briefed and decided (Pet. Br. 23-24), by arguing the question of manufacturer's liability. Why is this subject to reargument? Is petitioner attempting to utilize inflammatory statements (as was done on opening statement) in an attempt to prejudice this Court against respondents? Or has petitioner merely made the mistake of copying an unnecessary portion from his first petition for certiorari? As pointed out in Simpson's brief in opposition on the original petition (Resp. Br. 11-12), *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941) (Pet. Br. 24), is inapposite. Apparently petitioner did not learn his

lesson and seeks for some reason to reassert what truly is a moot position.

Petitioner's contention on his second point is sustained only if we schizophrenically assume a conspiracy by the entire Ninth Circuit to deprive petitioner of some right. Actually, petitioner is deprived of nothing; if his counsel will obey standard rules of conduct on the next District Court trial, petitioner shall have his jury trial free from error. It is no deprivation to demand and require a new trial when error deprives the respondent of fundamental fairness. Petitioner apparently believes that because he is a longshoreman, only he, not respondents, are entitled to fairness.

Petitioner belittles the error which requires the remand. Mr. Frank Pozzi, petitioner's attorney, is a well-qualified attorney, competent in the field of maritime personal injuries. In his opening statement he told the jury that Simpson, following the accident, no longer packaged the doors in the manner alleged. *Inter alia*, Mr. Pozzi indicated that Simpson was the *shipper* of the doors; this statement is incorrect.

More importantly, the observation brought to the jury's attention an alteration in packaging techniques subseqent to the accident, something which is irrelevant and highly prejudicial. Simpson was placed in a most difficult position: prejudicial comment was inserted at the very genesis of the case. Simpson's motion for mistrial was denied, and the improper statement of petitioner's attorney remained with the

jury with the only possible alleviation suggested by the Court being a cautionary instruction. Once the bell has been rung, such an instruction would merely serve to *further* impress the improper matter upon the jury's mind.

There might be some reason to believe that passion and prejudice will not be inculcated by a mere gratuitous remark of a witness; a different situation attends when an attorney (who ought to know better) indulges in improper and inflammatory statements. While it might not always be possible to determine beforehand just what a given witness will say, an attorney should be sufficiently grounded in law and familiar with the facts of his case so as not to put opposing counsel in this dilemma.

It is settled beyond doubt that evidence of precautions, changes and alterations made after the occurrence of an accident are inadmissible to show negligence at the time of the accident. See *Isaacs* v. *Southern Pacific Co.*, 49 F. 797, (Or. 1892); *Cox* v. *General Electric Co.*, 302 F.2d 389 (6th Cir. 1962); *Johnson* v. *United States*, 270 F.2d 488 (9th Cir. 1959) (cert. denied 362 U.S. 924); *Williams* v. *Portland General Electric Co.*, 195 Or 597, 247 P.2d 494 (1952); *Erickson's Dairy Products Co.* v. *Northwest Baker Ice Machine Co.*, 165 Or. 553, 109 P.2d 53 (1941); *Lacy* v. *Uganda Investment Corp.*, 7 Ohio App. 2d 237, 195 N.E.2d 586 (1964).

It is the duty of attorneys and judicial officers to prevent juries from considering extraneous issues,

irrelevant evidence, and erroneous law, and it is our further duty to guard against the influence of passion and prejudice. Bench and bar must labor together to insure all litigants an impartial trial. An omission by the Court or counsel to discharge such a duty renders the trial unfair. *Hockaday* v. *Red Line*, 174 F.2d 154 (D.C. Cir. 1949). Where counsel, even if unwitting, submitted at the very outset of the case an extraneous and improper statement to the jury and the Court failed to declare a mistrial, the defendant has been grievously harmed and the duty discussed in *Hockaday* has not been fully discharged.

Petitioner would have us believe that the Seventh Amendment imposes an impenetrable rampart against review of a judgment for damages for personal injury unless the Court of Appeals can affirmatively say the damages are monstrous. Of course, this is a misstatement; a Court of Appeals can also reverse a judgment if error contributed to the damages. That is the present situation. The District Court erred when it permitted plaintiff's attorney to infect the entire proceedings with an improper and erroneous comment on opening statement. Such a statement has a tendency to encourage a jury to increase an award of damages to "punish" a "shipper" who "no longer does things this way." Of course, Simpson never was the "shipper," the law does not provide for "punishment," and the fact that Simpson may or may not have changed its mode of packaging has absolutely no salience.

Petitioner exhorts this Court to "restore confidence" in the fairness of the appellate procedure and terminate this lengthy litigation by granting this petition. This simplistic approach overlooks the fact that the respondent, too, is entitled to fundamental fairness, and ignores the fact that much of the "protracted" litigation has been caused by conduct of petitioner and his attorney. The only way to "restore confidence" and orderly procedure is to deny the petition for writ of certiorari. After all, the Federal Rules provide that they ". . . shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, Fed. R. Civ. P., 28 U.S.C.

CONCLUSION

For the reasons set forth, respondent Simpson Timber Company prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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